IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1974 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE H.K. RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES

5. Whether it is to be circulated to the Civil Judge? : NO

1 to 4 : YES//5 : No

DALSUKHBHAI KESHAVLAL

Versus

NATIONAL INSTITUTE OF DESIGN

Appearance:

DR MUKUL SINHA for Petitioners

MR KS NANAVATI for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 7/07/2000

C.A.V JUDGEMENT

In the present petition, rule has been issued by this Court on 21st April, 1988 and by way of ad-interim direction, the operation and implementation of order Annexure-III dated 18th March, 1988 is stayed.

Suspension is dismissal mitgated at the discretion of the employer by a promise to re-employ.

The principles of natural justice are easy to proclaim but their precise extent is far less easy to define.

The rule against basis is one thing. The right to be heard is another. Those two rules are essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims : Nemo Judex in Causa Suo : and Audi Alteram Partem. They have recently been put in the two words : Impartiality and Fairness. But they are separate concepts and are governed by separate consideration.

One of the great principles of civilized jurisdiction which is a part of the law in Britain and which has been adopted in this country is that no man shall be a judge of his own cause. Closely allied to this principle is the other salutary principle that it is of fundamental importance that justice should not only be done but manifestly and undoubtedly seem to be done.

Justice must be rooted in confidence : and confidence : and confidence is destroyed when right minded people go away thinking.

In the present petition, in all six petitioners are there. Out of these six petitioners, petitioner no. 1 Shri Dalsukhbhai Keshavlal has already retired from service; petitioners nos. 3-Manubhai Damjibhai and Jasubhai Patel have settled the issued finally with the Management. Now, the present writ petition relates to petitioner nos. 2, 4 and 6 i.e. S/Shri S.S Pillai, Alfred Dalgada and Suresh S. Kuntmal, and in respect to petitioner no. 1 Shri Dalsukhbhai Keshavlal who is concerned with the relief which has been sought in the present petition. So, except petitioners nos. 3 & 5, all the other petitioners are interested party in the present proceedings.

In the present petition, the petitioners are challenging the suspension orders dated 30th November, 1987 passed by the respondent no. 2 and also challenges the action of the respondent-Management of reducing their `subsistence allowance' to 25% [twenty five percent] of their salary after the completion of three months' period of suspension vide order dated 18th March, 1988. It is

contended by the petitioners that the very action of suspension is arbitrary and illegal in so far as it violates clause 4.3 of the Service Rules of the respondent-National Institute of Design [hereinafter referred to as, `the Institute'] which provides for a preliminary inquiry to be conducted after giving an opportunity to the employees before placing them under suspension. In the instant case, according to the petitioners, no preliminary inquiry was conducted nor were the petitioners given any opportunity to show cause, and therefore, the impugned action of the respondent-Institute is totally illegal and void. The second challenge is the action of reducing the `subsistence allowance' of the petitioners by the respondents to 25% of their salary, after the period of three months of suspension is malafide, illegal, unjust and in violation of the service rules of the respondent Institute, and also in contempt of the order of the City Civil Court staying the inquiry proceedings, during the pendency of criminal case against the petitioners. The petitioners further submit that the respondent Institute is a `State' within the meaning of Art. 12 of the Constitution of India, and therefore, amenable to the writ jurisdiction of this Court under Art. 226 of the Constitution. The case of the petitioners is that Government of India fully finances and control the activities of the respondent-Institute, through the Ministry of Industry and has all pervasive control over the affairs of the Institute. Further, this Court has admitted several petitions against the respondent Institute; including Special Civil Application No. 6443 of 1987, by the Division Bench. The dispute regarding implementation of IVth Pay Commission recommendations had arisen around May, 1987 between the respondent-Institute and NID Employees' Association and in support of the said demand of employees for the implementation of the IVth Pay Commission recommendations, the Association led by the petitioners had stage peaceful demonstrations and other legitimate forms of protests. The respondent-Institute and the respondent no. 2 refused to negotiate with the only Association of the employees in respect of the demand of IVth Pay Commission pay scales, and therefore, the Association and the employees were constrained to continue their peaceful and legitimate direct action in support of their demand. On 30th November, 1987 at about 10.30 a.m. during the tea-break, while the employees were demonstrating in peaceful manner, the private security guards lead by the so-called Security Contractor Shri Naranappa and the Campus Warden Shri Bhagwat P. Shah attacked the employees injuring many, including the petitioners herein. The said attack

was solely aimed at breaking the peaceful demonstration and help the management to take action against the leaders of the Association on trumped up charged. According to the petitioners, immediately after the incident i.e. on 30th November, 1987, the Campus Warden Shri Bhagwat P Shah filed a criminal complaint with the Ellisbridge Police Station and a case was registered against the petitioners and one other temporary employee Shri Bhimjibhai. The petitioners and said Shri Bhimjibhai were placed under arrest and a criminal case was instituted against them, which is pending trail before the Metropolitan Magistrate, Court No. 15 at Ahmedabad. The petitioners no. 1 & 2 had also filed a complaint with the Ellisbridge Police Station against Shri Naranappa and his security guards on 30th November, 1987 in respect of the same incident, complaining that they were attacked by the so-called security contractor and his men and that they had suffered severe injuries. One of the petitioners Jasubhai Patel was admitted in the V.S Hospital with injuries but the police has not taken any action so far on the complaint filed by the petitioners. Considering these facts, the respondent-Institute has decided to suspend the petitioners and petitioner no. 2 as a General Secretary of the Association by an order dated 30th November, 1987 on the date of the incident itself. The said suspension order in respect to petitioner no. 2 has been produced on record at page 15 Annexure-I to the petition. The said suspension order has been issued by the respondent no. 2 under the rules of respondent-Institute applicable to the petitioner no. 2. The petitioners have further pointed out in the petition that against the order of suspension, which was clearly illegal since it violates clause 4.3 of the Service Rules of the respondent-Institute, has made representation to the respondent-Institute and similarly all the petitioners have also submitted representation against the suspension orders. It is contended that the Service Rules of the respondent Institute was formulated by way of a Bipartite settlement registered under Section 2 (p) read with Section 18 of the Industrial Disputes Act, 1947 [hereinafter referred to as, `the Act']. A copy of the relevant Service Rules has been produced at Annexure-III to the petition. It is contended that the provisions regarding disciplinary proceedings agreed to by the parties vide clause 6 of the said settlement read alongwith Annexure-II to the said Settlement were adopted by the service rules in so far as the disciplinary proceedings are concerned, and therefore, according to the petitioners the said service rules have statutory force and are binding on the parties as per the said 2-P

settlement. Thereafter, the respondent no. 2 issued notices to all the petitioners declaring the intention of holding domestic inquiry in respect of the charges levelled against them vide Chargesheet dated 7th December, 1987. A copy of the said charges as well as notice of domestic inquiry are annexed at Annexures IV & V respectively. Thereafter, the petitioner had filed a Civil Suit No. 908 of 1988 before the City Civil Court, Ahmedabad opposing the action of the respondent Management in initiating the departmental inquiry, pending the criminal case against them, on the very same charges which were levelled against them vide Chargesheet dated 7th December, 1987. The City Civil Court has granted stay against the departmental inquiry, pending the criminal case. A copy of the order below Notice of Motion in Civil Suit No. 908 of 1988 is annexed at Annexure VI of the petition. Thereafter, the respondent no. 2 has passed an order dated 18th March, 1988 [Anneuxre VII] reducing the subsistence allowance of the petitioners to 25% of their salary. Though the petitioners preferred a representation against the said reduction in the subsistence allowance to the respondent Institute, no response as yet has been given, and therefore, the petitioners have challenged both - the order of their suspension dated 30th November, 1987 and the order of reduction in subsistence allowance dated 18th March, 1988.

The respondent-Institute has filed affidavit-in-reply by one P.S.V Kurup on 10th December, 1999. In the said reply, the respondent has raised a contention that the suspension orders of the petitioners have been issued by the Institute on 30th November, 1987 due to their rioting disorderly behaviour and violence in the campus and causing damage to the property of the Institute. It is stated that the petitioners were also charge sheeted on 7th December, 1987 for the charges of violence and physical harm to others and causing bloodshed in the campus and committing criminal offence as well as abetting others to do criminal acts and commit riotous and disorderly behaviour during the working hours at the Institute. The respondent has also pointed out that they have appointed a retired High Court Judge, Mr. Justice A.D Desai, as the Inquiry Officer and entrusted the departmental inquiry to him. The Inquiry Officer had issued notice to the present petitioners for proceeding with the inquiry, however, instead of appearing before the Inquiry Officer, the petitioners had instituted a Civil Suit being Civil Suit No. 908 of 1988 on 22nd February, 1988 before the City Civil Court at Ahmedabad inter alia praying for permanent injunction against the

respondent Institute from acting in furtherance with the departmental inquiry or taking any disciplinary action in pursuance of the charge sheet dated 7th December, 1987. The City Civil Court has granted injunction against the respondent to conduct the departmental inquiry in view of the fact that criminal trial in respect of the very same incident was pending for decision. Now, against the order of injunction passed by the City Civil Court, the respondent-Institute had filed an Appeal from order being A.O No. 217 of 1988 before this Court. However, this Court did not interfere with the interim order passed by the City Civil Court in view of the fact that it was at interlocutory stage. It is clarified in the reply that the criminal trial commenced before the Metropolitan Court at Ahmedabad and on request being made by the respondent Institute, the Government of Gujarat appointed a senior Advocate Shri R.J Trivedi as Special Public Prosecutor of the said case. However, when Mr. Trivedi appeared in the matter, the present petitioners raised an objection and as a result, the Court decided to continue with the trial of the criminal case and asked the Public Prosecutor to hand over all the papers of the case to the learned Special Public Prosecutor Mr.Trivedi. Instead of proceeding with the trial, the petitioners challenged the appointment of Special Public Prosecutor by filing Special Civil Application before this Court wherein this Court granted stay of the proceedings in the criminal case pending final hearing of the writ petition. The said petition is also pending for final hearing before this Court. It is also pointed out in the reply that in the meanwhile, the petitioners have filed the present petition and this Court has admitted the matter on 21st April, 1988 and granted ad-interim relief staying the operation and implementation of the order dated 18th March, 1988. Thereafter, the petitioners moved a Civil Application No. 1282 of 1988 inter alia praying for 75% of the wages as subsistence allowance. On the said Civil Application, this Court vide order dated 31st August, 1988 gave directions to the respondent Institute to pay 75% of the wages as `subsistence allowance' to the petitioners with effect from 1st March, 1988. Against the said order dated 31st August, 1988, the respondent preferred Letters Patent Appeal No. 348 of 1988 before this Court which was also dismissed vide order dated 8th February, 1990. Accordingly, the respondent has been paying 75% of the wages as `subsistence allowance' to the petitioners. Respondent, in its reply has pointed out that besides the present petition, there are various disputes pending before various Courts of law. The Civil Suit No.908 of 1988 filed by the petitioners challenging the validity of the departmental inquiry before the City

Civil Court is also pending for final hearing. The criminal proceedings before the Metropolitan Magistrate, Court No. 15 against the petitioners is stayed pursuant to the order passed by this Court. The special Civil Application filed by the petitioners challenging the validity of the appointment of Special Public Prosecutor by the State of Gujarat is pending for final hearing and Special Civil Application No. 5510 of 1999 filed by the petitioner no. 1 inter alia praying for retirement benefits is also pending before this Court. The respondent has also pointed out in the reply that during the pendency of the present proceedings, the petitioners no. 3 & 5 gave letter of apology dated 25th July, 1999 and 16th August, 1999 admitting various charges levelled against them and requested the Institute to consider the matter sympathetically and to revoke the suspension order with immediate effect and direct the petitioners no. 3 & 5 to report for duty latest by 1st September, 1999. It is also pointed out by the respondent that in the aforesaid Civil Suit No. 908 of 1988 which is pending, if ultimately the petitioners succeed in that event, the petitioners will get all the consequential benefits, and therefore, this petition is required to be rejected and same should not be entertained. It is pertinent to note that in the present reply, the respondent has not raised contention about the maintainability of the present petition. The respondent has not raised contention specifically to the effect that the respondent Institute is not a `State' or `other authority' within the meaning of Art. 12 of the Constitution of India. Such a contention has also not been raised by the respondent Institute in its reply dated 10th December, 1999. Against the said reply, the petitioner has filed affidavit-in-rejoinder. The said rejoinder has been filed by the petitioner no. 2 on 15th December, 1999. The petitioners in the said rejoinder have pointed out that sometime back, the respondent no. 1 has given a draft letter to the petitioners for being signed by them and based on the said letter, the petitioners were to be reinstated in service and the inquiry proceedings were to be dropped. The said letters have been given to the respondent Institute duly signed by the petitioners, however, the Management wants to settle other issues which were enumerated in the draft settlement points before suspension was revoked. After signing the said letter, the petitioners have received a communication from the respondent on 15th April, 1998 from the Executive Director of the respondent Institute stating that the letters submitted by the petitioners were still under consideration. The said letters had been signed by the petitioners on 10th of February, 1988; after

protracted discussions, however, the Management had gone back on their assurance to revoke suspension because it was not possible for the petitioners to agree to the settlement points on other issues; including the issue of SEWA which were being insisted upon. It is also pointed out by the petitioners that the Apex Court has already rejected Special Leave Petition filed by the respondent Institute against the judgment and order of the Division Bench of this Court the SEWA case. An affidavit-in-reply to the Affidavit dated 23rd December, 1999 has been filed by the respondent-Institute. In the said reply, the respondent has raised contention in paragraph 2 that the present petition is not maintainable inasmuch as the respondent Institute is not a `State' within the meaning of Art. 12 of the Constitution of India and the respondent Institute is a Society registered under the Societies Registration Act and a Trust registered under the Bombay Public Trusts Act, imparting education to the students engaged in the field of research and development in various disciplines of design, and offering consultancy services as a part of education and research. In the said reply, it is also pointed out that the service conditions of the employees in the Institute are governed by the Model Standing Orders; since there are no certified standing orders. Clause 25 (5) of the Model Standing Orders empowers the respondent Institute to place an employee under suspension, by an order in writing, and a relevant sub-clause (5) (a) of Clause 25 has been incorporated in the said reply. Further, in the said reply, three contentions have been raised viz., that the 2-P settlement has not been registered, and therefore, it has not statutory force. Moreover, in any case, the said settlement does not supersede the provisions of the Model Standing Orders, which has the statutory force. It is also made it clear that the situation at the relevant time was so tense that it was impossible for the Institute to act exactly as per the 2-P settlement as the petitioners were demonstrating in the corridors of the main building of the Institute during the working hours and tried to force the entry into the administrative department of the respondent Institute, and in the process, the petitioners pelted stones breaking glass panes of the administrative department thereby injuring security and administrative personnel available on duty and also physically assaulted the security staff, as a result whereof the security staff and administrative staff sustained grievous injuries. Therefore, the respondent Institute was not able to act exactly as per the 2-P settlement which ultimately amounts to breach of provisions of said settlement for which an alternative efficacious remedy

under the Industrial law is available to the petitioners. The said reply has been filed by the respondent-Institute on 23rd December, 1999. Thereafter, the respondent Institute has filed additional affidavit on 18th January, 2000. In the additional affidavit, it is contended that the respondent Institute is neither a `State' nor `an instrumentality of State' within the meaning of Art. 12 of the Constitution of India. In support of this contention, functions of the respondent Institute have been narrated just to satisfy the test that the respondent Institute is not a `State' or `other authority' within the meaning of Art. 12 of the Constitution of India. Alongwith the said affidavit, memorandum of association has been produced on record. Against that, the petitioners have filed additional Affidavit-in-Reply pointing out that the present petition was filed in the year 1988 and the respondent Institute did not file any Affidavit-in-Reply till December, 1999 i.e. about 11 years, and therefore, respondents cannot be permitted to file counter affidavit after a gap of 11 years and this Court cannot take into consideration such affidavits. It is also pointed out by the petitioners that after the arguments, such preliminary objections cannot be permitted to be raised viz., that the present petition is not maintainable and/or the respondent Institute is not a `State' or `other instrumentality of the State' within the meaning of Art. 12 of the Constitution. It is also pointed out by the petitioners that the respondent Institute has subjected itself to the writ jurisdiction of this Court in the present petition during past 11 years. Further, the respondent Institute has also submitted itself to the jurisdiction of this Hon'ble Court under Art. 226 of the Constitution in several other writ petitions; one of them being Special Civil Application No. 6443 of 1987. It is also pointed out by the petitioners that in number of petitions, interim orders have been made by this Court for and/or against the Institute. It is also made it clear that not only the interim orders but also at final stage, such orders have been complied with by the Institute from time to time. Further, such contention about the respondent Institute is not a `State' is an afterthought and wholly frivolous and ought to be rejected on the basis of the conduct of the respondents. It is also pointed out by the petitioners that if such contention could have been raised at the relevant time i.e. in the year 1988 and not after 11 years, then the petitioners might have explored any other remedy available to them instead of waiting for this question to be decided first by this Court. It is contended that yet in the past 11 years, the respondents not only did not raise any such

preliminary objection but has not even challenged the interim order passed in the petition, and while challenging the order passed by this Court in Civil Application No. 1282 of 1988 before the Division Bench in LPA the respondent did not raise this preliminary issue which would have gone to the root of the matter. The petitioners have placed reliance upon a decision of the Apex Court in the matter of Ajay Hasia v. Khalid Mujid, reported in AIR (1981) SC 487 and the respondent Institute has placed reliance upon decision of Apex Court in the case of Re : NCERT, reported in AIR (1992) SC 76. The said rejoinder has been filed by the petitioners on 24th February, 2000. The petitioners have produced, alongwith the said rejoinder, Annual Report of the respondent Institute for the year 1996-97. The petitioners have also produced a copy of the Affidavit-in Reply filed by the respondent Institute in Misc. Civil Application NO. 820 of 1997 in Civil Application No. 1282 of 1988 and also produced Office Memorandum dated 27th September, 1993 dated 14th July, 1995 and 6th September, 1996. The petitioners have also produced Affidavit of the respondent Institute filed in Special Leave Petition No. 7003 of 1998. Thereafter, Affidavit-in-Sur-Rejoinder has been filed by the respondent Institute on 13th March, 2000. In the Sur-Rejoinder, the respondents have raised similar contention about the respondent Institute being not a `State' and `other instrumentality/authority of the State' within the meaning of Art. 12 of the Constitution and the averments have been made to the effect that it is not controlled by the Central Government and the source of income has been pointed out by the respondent Institute. According to the respondent Institute, it is an autonomous institution and has been a catalyst for design in Indian industry. It has its social commitment who help prepare students for rewarding careers in sectors of social need and for the said purpose the respondent Institute is actively involved in design projects, educating design professionals etc. The said functions carried by the respondent Institute are not the government functions. It is also pointed out by the respondent Institute that in Special Civil Application No. 5510 of 1990 filed by one of the petitioners i.e. petitioner No.1, it is averred that the respondent NID is not a department of the Government of India and the Institution has its own Contributory Provident Fund Scheme, Gratuity and medical scheme, etc. unlike those applicable to the Central Government employees who are governed by various CCS Rules. Alongwith Sur-Rejoinder, the respondent Institute has also produced a copy of Special Civil Application No. 5510 of 1990 filed by the

petitioner no. 1. The respondent Institute has also produced a copy of decision given by this Court in Special Civil Application No. 2025 of 1983 dated 1st October, 1991 [Coram : S.M Soni, J.]. The said decision has been produced by the respondent Institute to support its contention that the Institute is not a `State' within the meaning of Art. 12 of the Constitution. The respondent has also produced one letter dated 3rd March, 2000 addressed to petitioner Dalsukbhai Keshavlal wherein the amount of gratuity has been calculated and paid to the said petitioner no. 1, as per the orders passed by this Court in Special Civil Application No. 5510 of 1999.

I have heard at length, learned advocate Mr. Mukul Sinha and learned Sr. Advocate Mr. K.S Nanavati for the respective parties.

It is undisputed that the petitioner no. 2 alongwith other petitioners was suspended by the respondent-Institute on 30th November, 1987. The said suspension order has been issued by the respondent-Institute wherein it is mentioned that, `you are hereby suspended from NID service, pending inquiry with immediate effect. The chargesheet narrating charges levelled against you for which the suspension order is passed is being sent to you separately. You will be paid subsistence allowance as per the rules applicable to you. Against the suspension order, on 29th December, 1987, the petitioner no. 2 and other petitioners similarly situated, had represented to the respondent-Institute and pointed out that the said order of suspension is ex facie illegal and void since it is in contravention of Clause 4.3 of the 2-P settlement dated 14th December, 1984. As per the said clause, an employee can be placed under suspension only after conducing a preliminary inquiry and after giving an opportunity to the concerned employee to give explanation regarding the proposed action of placing him under suspension. In the present case, the petitioners have been placed under suspension with immediate effect by an order dated 30th November, 1987; without complying with the requirement of aforesaid clause. It is, therefore, clear that no inquiry preliminary or otherwise was conducted and it is a fact that the petitioners have not been given any opportunity to show cause against the proposed action of their suspension. The said representation dated 29th December, 1987 had remained unattended. Now, the 2-p settlment dated 14th December, 1984 was arrived between the respondent-Institute and the office bearers and Managing Committee members of the NID Employees' Association. The

said settlement has been signed by the Management and also by the Office bearers & members of Managing Committee of the Association. When the settlement was signed, at that occasion, Shri Dalsukhbhai Keshavlal was President and Shri S.S Pillai was General Secretary of the Association. Said Shri Dalsukhbhai Keshavlal is petitioner no. 1 and Shri S.S Pillai is petitioner no. 2 in the present writ petition. Therefore, it is undisputed fact that when the settlement was signed, these two petitioners were office bearers of the Association. The relevant item of settlement i.e., item no. 6 is in respect of Service Rules whereunder NID Management and the Association have agreed to the substitution of the existing disciplinary clause in NID service rules [clause no.4] with the disciplinary clause as at Annexure-II. Clause 4.4 (a), 4.4 (B), 4.13 to 4.19 are adopted tentatively and will be finalised after full discussion in the Consultative Committee. That, any proposals for addition/alteration/modification to the remaining clauses in the Service Rules will be placed before the Consultative Committee for consideration. Annexure-II to the agreement has been annexed to the settlement and it is a part of the settlement. The relevant Service Rule 4.3 reads as under:-

> `Where a disciplinary proceeding against an employee is contemplated or is pending or where criminal proceedings against him in respect of any offence are under investigation or trial and the Institute authorities are satisfied after prima facie investigation and due opportunity of explanation given to the concerned employee that it is necessary or desirable to place the employee under suspension, he may, by order in writing, be suspended by the competent authority with effect from such date as may be specified in the order. A statement setting out in detail the reasons for such suspension, will also be recorded.'

Now, according to the said Service Rules, in case any disciplinary proceedings are required to be initiated against any employee or the same is contemplated, the respondent Institute has to first satisfy itself; after prima facie investigation and due opportunity of explanation given to the concerned employee that it is necessary or desirable to place an employee under suspension, then he may be suspended by the competent authority with effect from such date as may be specified in the said order. The statement setting out in detail reasons for such suspension shall also be recorded. The

said service rule is part and parcel of 2-p settlement dated 14th December, 1984. In Civil Application No. 1282 of 1988 in Special Civil Application No. 1974 of 1988 [i.e., this petition], this Court has passed an order dated 31st August, 1988 wherein it is observed that, `it is on the basis that parallel criminal proceedings is pending. The Management submits that they have no control over the criminal proceedings which is in charge of the State but there is no dispute that the charges in the criminal case and in the departmental enquiry are the same. In that view of the matter, it cannot be said that the delay in enquiry is attributable to the applicants.. The Management is, therefore, bound to pay increased subsistence allowance.' Hence, prayer 6 (A) of C.A came to be granted by this Court. Thereafter, it is also necessary to refer the order passed by the Division Bench of this Court in Letters Patent Appeal No. 348 of 1988 wherein it is observed that, `..it is not disputed that under Rule 4.3 of the rules for disciplinary action for misconduct, the appellants have power to suspend an employee. Rule 4.4 of the said rules provides for subsistence allowance during the period of suspension.'

Learned advocate Mr. Sinha appearing for the petitioners has submitted that the suspension order dated 30th November, 1987 is contrary to the service rule no. 4.3. It violates 2-p settlement and before passing the suspension order, no show cause notice was given to the petitioners; no enquiry was initiated against the petitioner and it is a special condition; as per the service rules, which is required to be followed, and the same have not been followed in the present case, therefore, the suspension order is bad and illegal. According to Mr. Sinha, service rules governs suspension and prior to that a prima facie enquiry and to have reasonable opportunity against such enquiry and a reasoned order must have to be passed by the competent authority and the same is required to be recorded as per these service rules. Mr. Sinha submitted that `satisfaction of the competent authority' is not like `subjective satisfaction'. He also submitted that none of the requirements of service rules, including rule 4.3, have been satisfied by the respondent Institute before passing the suspension order against the petitioners. He further submitted that the contention with respect to respondent Institute not being a `State' within the meaning of Art. 12 of the Constitution cannot be permitted to be raised at a belated stage i.e. after elapse of 11 years. Mr. Sinha argued that initially when the reply was submitted by the respondent-Institute,

no such contention was raised, and therefore, such a contention is an afterthought and the same cannot be permitted to be raised before this Court now. In respect to the contention with regard to availability of alternative remedy to the petitioners, Mr. Sinha submitted that once the petition has been admitted by this Court then the question of having alternative remedy does not arise and the same cannot be considered by this Court when the matter has been admitted and had reached the final hearing stage. However, he also made submission that the alternative efficacious remedy which has been suggested by the respondent-Institute is not really effective remedy because to challenge the suspension order under the provisions of Industrial Disputes Act, 1947, Sec. 2 (A) is not available to the petitioners because the said Sec. 2 (A) gives right to the individual employee to challenge his termination, discharge and dismissal by way of raising an industrial dispute before the Conciliation Officer but the petitioners have no right to challenge the `suspension order' by filing a complaint under Sec. 2 (A) before the Conciliation Officer. According to Mr. Sinha, though an individual cannot challenge the suspension order under the provisions of the Act, his Union can sponsor the cause of the workman, and therefore, it is not a clear, effective alternative remedy available to the petitioners, as a matter of right. Mr. Sinha submitted that the settlement is binding to the respondent-Institute and similarly service rules which is part and parcel of the settlement is also binding to the respondent-Institute. He also submitted that various orders, in number of petitions have been issued by this Court and thereby implemented by the respondent Institute and in none of these petitions, such a contention had ever been raised by the respondent-Institute. He also submitted that the order passed by this Court in Civil Application No. 1282 of 1988 dated 31st August, 1988 was challenge by the respondent-Institute in Letters Patent Appeal No. 348 of 1988 wherein the Division Bench of this Court on 8th February, 1990 decided the issue. Even in the present proceedings, LPA was filed by the respondent Institute and even on that occasion, no such contention has been raised that the respondent-Institute is not a `State' or `other authority' within the meaning of Art. 12 of the Constitution, and therefore, considering the past conduct of the respondent-Institute, such a contention cannot be permitted to be raised in the present petition. He also submitted that now considering the conduct of the respondent-Institute, the respondent-Institute having estoppel from raising very same contention after lapse of 11 years. He also

submitted that if suppose initially in the year 1988; before admission of this petition, if such a contention could have been raised by the respondent-Institute, then the petitioners would have definitely considered to have some alternative remedy and decided to approach the Industrial Forum but after lapse of 11 years when the matter has been admitted and the respondent-Institute had remained silent all alone and not raised such a contention and all of a sudden such a contention has been raised, which is an after thought, just to deny the relief to the petitioners, the same cannot be permitted to be raised at this stage. He also submitted that the question of jurisdiction of this Court is not a pure question of law but it is mix question of fact and law, and therefore, according to his submissions, in the present petition such a contention which has been raised by the respondent-Institute that the writ petition is not maintainable against it cannot be permitted to be raised. Mr. Sinha has relied upon a decision of the Apex Court in case of Ajay Hasiya [Supra]. He also placed reliance upon certain documents at page 149, 150, 161, 171 and 182, 183 of the petition. He submitted that the affidavit filed by the respondent-Institute in Special Leave Petition [Page Nos. 172 and 176 to 199], the respondent-Institute is having public functions and also having a monopoly centre and deep control of the Central Government. It is contended that the Central Government provides entire fund and only a part of the revenue is generated by the respondent-Institute and that part revenue cannot be considered to be a private fund because the same is not provided by any private party but it is also from the Government estate. Therefore, according to Mr. Sinha, the respondent-Institute satisfies all the tests of being a `State' or `other authority' under Art. 12 of the Constitution and therefore, writ is maintainable. Thus, according to Mr. Sinha when the respondent-Institute is a `State' and it had violated the service rule 4.3, and therefore, the present petition is required to be allowed.

On the other hand, learned Sr. Advocate Mr. Nanavati has raised a contention that the respondent-Institute is not a `State' or `other instrumentality of the State' within the meaning of Art. 12 of the Constitution of India. He also raised other contentions that whether suspension order has been passed by the respondent-Institute in terms of the settlement or in term of the service condition or rules or not are required to be considered by this Court. He also submitted that the order of suspension has been passed under the provisions of the Model Standing Orders, and

therefore, he relied upon averments made in the affidavit in reply filed by the respondent-Institute at page 71 and 73 of the said reply. He raised another contention that whether in case of conflict between the Model Standing Orders or Service Rules then in such circumstances which shall prevail. For that, he has placed reliance upon paragraph nos. 6 & 9 of a decision of the Apex Court in case of Western India Match Company Limited v. Workmen, reported in (1974) 3 SCC 330 and pointed out that according to the said decision, in such a case of conflict between the service rules and the standing orders, the standing order definitely shall prevail upon the service rules, and therefore, according to Mr. Nanavati though there is no certified Standing Orders, the standing orders Act of 1946 is applicable to the respondent-Institute, and therefore, the model standing orders are applicable and under the provisions of the said Model Standing orders, clause 25 (5) is applicable to the present facts of the case and respondent-Institute is empowered to suspend any of its employee under the said provisions. He also submitted that assuming that if the Standing Orders Act is not applicable or Model Standing Orders are not applicable then at the most it is the case of breach of settlement or service rules and after all it was a private settlement and therefore in such a situation, the petitioners are having alternative efficacious remedy to have prosecution for breach of 2-p settlement against the respondent-Institute. He also submitted that it was not a 2-p settlement dated 14th December, 1984 arrived at between the respondent-Institute and the association. He also submitted that such a settlement is not directly within the meaning of Sec. 2 P of the Act and therefore Sec. 18 is not applicable and that such settlement is not binding to the respondent-Institute. He also submitted that for breach of agreement, no petition can lie and it is not a fundamental right which is violated by the respondent-Institute and it is a contractual right and in such circumstances, such a petition cannot lie and petitioners are having alternative efficacious remedy, and therefore, this petition is required to be dismissed. In support of his arguments, Mr. Nanavati has placed reliance upon decision of the Apex Court in case of Chandramohan Khanna vs. N.C.E.R.T [AIR (1992) SC 76]. He has also placed reliance upon the decision of this Court in the matter of Gujarat State Fertilizers Company Limited [1995 (2) GLH 179] wherein the Division Bench of this Court has held that GSFC is not a `State' or `other Authority' within the meaning of Art. 12 of the Constitution of India. He also submitted that writ may be maintainable, however, the question is necessary to be

examined as to whether respondent-Institute is a `State' or not. Now, unless and until the respondent-Institute is declared `State' or `other Authority' within the meaning of Art. 12 of the Constitution, provision of Art. 14 will not apply in absence of such a decision, and therefore, though the writ may be maintainable but Art. 14 is not available to the petitioners, and therefore, validity and legality of suspension order cannot be examined in a writ petition. He also relied upon page nos. 165, 166, 186 and 187 and pointed out that respondent-Institute is not an arm of the Government. Strengthening his arguments, Mr. Nanavati has also placed reliance upon a decision rendered by the learned Single Judge of this Court in Special Civil Application No. 2025 of 1983 wherein it is held that IFFCO is not a `State' or `other authority' within the meaning of Art. 12 of the Constitution. Mr. Nanavati submitted that the preliminary contention raised by the respondent-Institute that it is not a `State' within the meaning of Art. 12 of the Constitution is required to be examined first and thereafter this Court should go into the merits of the matter. He also submitted that if the respondent-Institute is not declared to be a `State' then the present petition must fail. He also submitted that a criminal case filed by the respondent Institute is pending and even the departmental inquiry is pending and they are getting 75% of the subsistence allowance from the respondent-Institute. He also submitted that even rule 4.3, if read strictly, then before passing the suspension orders, no preliminary inquiry is necessary and it is a too technical interpretation of Rule 4.3 and even such technical interpretation or technical non compliance would not invalidate the suspension order. Therefore, according to Mr. Nanavati, the respondent Institute is not a `State' or `other authority' and he submitted that the suspension order is legal and valid, and therefore, the present writ petition is required to be dismissed. Countering the submissions made on behalf of the respondent-Institute, Mr. Sinha pointed out that such a contention which has been raised presently by the respondent-Institute is an afterthought and nowhere it was mentioned that the suspension order was issued under the provisions of Model Standing Orders, on the contrary, on two occasions, the respondent-Institute has specifically made it clear that the suspension order has been issued under the Service Rule 4.3 and the Model Standing Orders have not been taken into account. He relied upon the first line of the oral Order dated 8th February, 1990 made in Letters Patent Appeal No. 348 of 1988 whereby the Division Bench of this Court had observed that, `..It is not disputed that under Rule 4.3

of the rules for disciplinary action for misconduct, the appellants have power to suspend an employee. Rule 4.4 of the said rules provides for subsistence allowance during the period of suspension.' He submitted that if the Model Standing Orders are made applicable, even in that circumstances, there is provision in the Model Standing Orders that in case the service benefits are higher to the employees under the provisions of Service Rules, then in that circumstances, the same shall have to be applied in derogation of the Standing Orders and in such circumstances, the Standing orders cannot have any adverse effect. Therefore, Mr. Sinha submitted that the safe guard which has been provided under the Service Rule 4.3 cannot be ignore when the Standing Orders is not having higher or more benefit to the workman concerned. Mr. Sinha relied upon Sec. 32 of the Standing Orders Act, 1946 and pointed out that when Service Rules are better in comparison to the Standing Orders, then in such circumstances, Service Rules prevail. Now, in the present case, service rules are beneficial, giving higher safe guard against the suspension of any employee, and therefore, the Model Standing Orders, Clause 25 (5) (a) is not applicable to the present case. Mr. Sinha has submitted written submissions before this Court and as against that, respondent Institute has not submitted any written submission.

Learned Sr. Advocate Shri K.S Nanavati submitted that the respondent-Institute is established under Clause 3 of the Memorandum of Association which inter alia includes providing service, training and research in the field of design in industry, graphic, arts, architecture, etc., to establish, equip and maintain workshops, laboratories or factories with modern machinery and equipments in order to undertaken scientific and technological research for the production of goods and the optimum exploitation of raw materials and processes, to encourage and improve education of persons who are engaged or are likely to be engaged in the service training and searches, etc. He submitted that the income and the property of the respondent Institute is to be utilized towards the promotion of its objects and it cannot be disposed of by way of dividends, bonus, etc. Mr. Nanavati submitted that Rule 3 of the Rules & Regulations of the Institute provides for the constitution of the Society, and the affairs of the Institute shall be administrated, directed and controlled in accordance with the said rules and regulations by the governing Council as provided under Rule 26A. The said Governing Council shall consist of Chairman to be nominated by the Central Government and other officials,

as provided under Rule 26-B, which includes, Mayor, Chief Secretary, other Government Officials, or a management expert, an outstanding Craftsman, Professionals from Engineering, Technology, Architecture, Fine Arts and/or Mass Media. Mr. Nanavati further submitted that the funds of the respondent-Institute consists of (i) Grants from the Government of India; (ii) Contributions from other sources; (iii) Income from Investments; and (iv) receipts from other sources. He further submitted that the main objects of the respondent-Institute is imparting education and providing service, training and research in the fields of design. Mr. Nanavati further argued that the government control is confined only to the proper utilization of the grant received by the Institute and it is as such an Autonomous Body. He vehemently argued that the respondent-Institute is not a `State' nor `an instrumentality or agency of the State' within the meaning of Art. 12 of the Constitution of India because there is no element of public service involved in the work performed by the Institute. Mr. Nanavati contended that the respondent-Institute also does not enjoy any monopoly status conferred by the State and there is also no deep and pervasive state control in the day to day functioning of the Institute, and since the respondent-Institute is neither a State nor an instrumentality of the State, no writ can be issued against it. Further pressing this contention, Mr. Nanavati submitted that the respondent-Institute is free to apply its income and property towards the promotion of its objectives and implementation of the programmes. He submitted that for the year 1996-97, the Institute earned an amount of Rs. 2,54,33,129 through recurring income and received a grant of Rs. 2,71,81,100, and whereas, for the year 1998-99, the recurring income was Rs. 2,42,21,848 and the grant received was Rs. 3,93,35,416. Thus, it was contended that the respondent Institute is not fully financed by the Government. In support of his arguments, Mr. Nanavati has placed reliance upon a decision of the Hon'ble Supreme Court in the matter of Chandramohan Khanna v. NCERT, reported in AIR (1992) SC 76 wherein it is held that, `the State control does not render such bodies as `State' under Art. 12. The State control, however vast and perversive, is not determinative. The financial contribution by the State is also not conclusive. The combination of State-aid coupled with an unusual degree of control over the management and policies of the Body and rendering of an important public service being the obligatory functions of the State may largely pointed out that the body is a `State'.

On the other hand, Mr. Sinha submitted that the reliance placed upon the judgment in the case of Re : NCERT [Supra] is without any substance as the Hon'ble Supreme Court has not laid down any new principle or test to determine whether an authority is `State' within the meaning of Art. 12 of the Constitution and has obviously adopted the test laid down by the Constitution Bench in the case of Ajay Hasia v. Khalid Mujib [Supra]. Mr. Sinha submitted that the case of NCERT can easily be distinguished on the facts from the present case, since evidently, NCERT was not directly carrying out any function of imparting education or conferring any degree or diploma or executing any Government policy. He contended that NCERT is essentially an organization set up for the purpose of advising the Government as to the syllabus and curriculum of secondary education and for this purpose, NCERT also printed and published books and other reading materials. Thus, according to Mr. Sinha, NCERT had no direct role whatsoever to play in carrying out or executing any Governmental function or function which is akin to Government function.

Mr. Sinha further submitted that the respondent-Institute was specifically set up by the Government of India to carry out the governmental function of training and imparting education to create required manpower for the country, to meet its design needs, especially in the field of industrial design. He further submitted that in several affidavits filed by the respondent-Institute before this Court as well as Hon'ble Supreme Court, the Institute has contended that it is set-up by the Government of India to perform the important function of imparting education in design and training the man-power. Not only that, from the said affidavits, it emerges that the respondent-Institute is very much part and parcel of the Government machinery and that every service condition of the employees, including salary and other benefits are directly controlled by the Government of India and that the respondent Institute cannot deviate in any manner from the Government directions in that regard. Mr. Sinha contended that even the respondent Institute has gone to the extent of saying that even the `subsistence allowance' being paid to the present petitioners is paid only in accordance with the government directions. Mr. Sinha further pointed out that the respondent-Institute has no powers to grant any financial benefit to its employees; either in terms of salary or otherwise, without the specific prior approval of the Government in Ministry of Industry. In this context, Mr. Sinha drew attention of this Court to a copy of the Approval Letter of the Government of

India for revising the pay scale of NID employees in the year 1975. He also drew attention of this Court towards the communications of the Government addressed to the Institute with respect to implementation of IVth Pay Commission recommendations and also communication dated 28.7.1977 with regard to duration and timing of lunch break, tea break, etc. in the respondent Institute. Mr. Sinha submitted that the faculty members of the respondent Institute are desirous of receiving the benefits of UGC pay scales from 1994, however, they have not been able to receive the same due to non-approval from the Government. Thus, according to Mr. Sinha, the deep and pervasive control of the Government reaching all the way upto the payment of subsistence allowance to suspended employees is now obviously an admitted fact. He further submitted that from the Memorandum of Association as well as declarations made in the Annual Reports, it can be seen that the Governing Council of the Institute is constituted only by the Central Government officials, and the power to terminate any member of the Governing Council is solely vested with the Government. Mr. Sinha further reiterated that the entire recurring and non-recurring expenditure is paid by the Central Government and the contention that the respondent Institute also makes its own earnings does not in any way make such earnings a private input of finance, particularly when, not a single rupee is contributed by any private party and if at all the Institute makes any earning, it is on the basis of the manpower and assets created out of the government funds. Mr. Sinha has gone to the extent saying that many statutory Corporations and Government Companies like NDDB, Bharat Petroleum Limited which are run entirely on their own income which is generated from the business in which they are engaged, and these organizations instead of taking any money from the Government, they actually lends money to the Government. In support of this contention Mr. Sinha cited the case of NDDB and reiterated that the said fact does not disqualify such organizations from being a `State' within the meaning of Art. 12 of the Constitution. Thus, Mr. Sinha contended that merely because the respondent-Institute generates revenue by taking up projects or doing consultancy work does not in any manner dilute its character or status as an authority under Art. 12 of the Constitution particularly when the entire infrastructure of the respondent-Institute is created out of the capital expenditure funds granted by the Government.

Carrying further his case, Mr. Sinha submitted that not only that the respondent Institute carry out

Government functions but also such functions and programmes have to be specifically cleared and approved by the Government or the Planning Commission before being implemented. Mr. Sinha further urged that the respondent-Institute does enjoy a monopoly status in the field of design, since this is the only national institute, recognized by the Department of Science and Technology of the Government of India to impart education in the field of design, including Industrial Design. Mr. Sinha confirms that no other institution in the country has been given such a status in the field of design education, and in that view of the matter, all these tests which have been laid down by the Supreme Court in the case of Ajay Hasia [Supra] are fully satisfied and the National Institute of Design is a`State' within the meaning of Art. 12 of the Constitution. Distinguishing the pronouncement of the Apex Court in the case NCERT, Mr. Sinha submitted that the respondent-Institute closely resembles organizations like ICAR because it is organizationally and functionally at par with the Physical Research Laboratory; which though being a registered Public Trust, is held to be a `State' by this Court in cause of (Dr) Mukul Sinha v. P.R.L., reported in 1984 GLH (NOC) 9 in para 49 of the said decision.

While considering the submissions made by both the learned advocates, it is first of all necessary to consider the Memorandum of Association of the respondent-Institute wherein in Item No. 3, the objects for which the Society is established have been narrated in detail. Item No. 4 is relevant wherein it is provided that, `the Government may appoint one or more persons to review the work and progress of the Society and to hold inquiries into the affairs thereof and to report thereon in such manner as the Government of India may stipulate. Upon receipt of such report, the Government of India may take such action and issue such directions as it may consider necessary in respect of any of the matters dealt with in the report and the Society will be bound to comply with such directions.' The other relevant provisions in the Memorandum of Association are with respect to Governing Council wherein it is stated that, `the affairs of the Society shall be administrated, directed and controlled, in accordance with the rules and regulations of the Society, by a Governing Council. The Governing Council of the Society shall consists of the following members :-

(i) Chairman - To be nominated by the Central Government.

(ii) The Mayor, Ahmedabad City.
(iii) The Chief Secretary to the Government of Gujarat.
(iv) A representative of the Ministry of Industrial Development, Government of India.
(v) A representative of the Ministry of Education, Government of India.
(vi) A representative of the Ministry of Finance, Government of India.
(vii) Following to be nominated by the Central Government :-

(a) A management expert.
(b) An outstanding craftsman.
(c) Four professionals from Engineering, Technology, Architecture, Fine Arts and Mass Media.
(d) A professional representative of small scale industry.
(e) Three members to be elected by the Electoral College consisting of persons nominated by companies, firms or individuals contributing Rs. 25,000/= to the Institute's fund. For this purpose, if the contribution from individual units of a group under one management is less than Rs. 25,000/= then the group will be entitled to one vote in the Electoral College.

(viii) Four persons to be co-opted by the Governing Council.
(ix) Two faculty members to be nominated by the Chairman.
(x) The Executive Director of the Institute.

Clause 26 (c) provides that, `the Chairman of the Council will be nominated by the Government of India amongs the members of the Council who shall hold this office for such time as may be specified by the Government of India'. Clause 25 (d) provides that, `in the event of a disagreement between the representative of the Ministry of Finance, Government of India and the Chairman of the Governing Council of NID, on the financial matters beyond the delegated powers of the Ministry/Department of the Government of India, the matter shall be referred to the Minister of the concerned administrative Ministry and the Finance Minister for a decision.' Clause 29 (c) provides that, `the Government of India may terminate the membership of any member or at one and the same time of all members other than the ex-officio members of the Governing Council or the members elected under Rule 26 (b) (vii)(e). Upon such termination, the vacancy shall

be filled by the Government of India.' Clause 37 provides that, `the President or the Chairman may refer any question, which in his opinion, is of sufficient importance for the decision of the Government of India and such decision shall be binding on the Society and its Governing Council. Clause 51 relates to the funds of the Society. The funds of the Society will consist of the following :-

(a) Grants made by the Government of India
(b) Contributions from other sources
(c) Income from investments
(d) Receipts of the Society from other sources

Clause 55 of the document provides that, `subject to the approval of the Government of India, the Society may alter or extend the purposes for which it is established in accordance with the provisions of the Societies Registration Act, 1860. Whereas, Clause 56 provides for dissolution of the Society wherein it is provided that, `the Society shall not be dissolved without the consent of the Government of India and on such dissolution the assets of the Society shall be dealt with in accordance with the provisions contained in the Societies Registration Act, 1860. Further, in the Annual Report for the Year 1996-97 it is mentioned that, `the National Institute of Design (NID) is internationally recognized as one of the foremost institutions in the field of design education, research and training. It has been the recipient of several national and international awards since it was established in 1961 as an autonomous institution under the Ministry of Industry, Government of India. NID has been a catalyst for design in Indian Industry, as its graduates are active in all sectors of the economy. Today, the Institute is being called upon to share its experience with new centres of design training being established in India and elsewhere to promote design education in the service of economic development. NID has been recognized as a Scientific and Industrial Research Organization by the Ministry of Science & Technology, Government of India.' Similarly, in the another Annual Report for the year 1997-98 [at page 171 of the petition] it is mentioned that, `National Institute of Design [NID] is internationally recognized as one of the foremost institutions in the field of design education, research and training. It has been the recipient of several national and international awards since it was established in 1961 as an autonomous institution under the Ministry of Industry, Government of India. NID has been a catalyst for design in Industry Industry, as its graduates are active in all sectors of

the economy. Today, the Institute is being called upon to share its experience with new centres of design training being established in India and elsewhere to promote design education in the service of economic development. NID has been recognized as a Scientific and Industrial Research Organization by the Ministry of Science & Technology, Government of India.' It is also pertinent to note that vide Office Memorandum dated 27th September, 1993, 14th July, 1995 and 6th September, 1996 issued by the Joint Secretary to the Government of India, Ministry of Finance, Department of Expenditure wherein the Government has approved the scale of pay of the Central Government which applies to the employees of the respondent-Institute.

Learned counsel Mr. Nanavati has heavily relied upon two decisions in support of his contention that the respondent-Institute is not a `State' or `other instrumentality of the State' within the meaning of Art. 12 of the Constitution of India. One such decision being in the matter of GSFC & Ors. v/s. Association of Officers of GSFC, reported in 1995 (2) GLH 179. In the said decision, the Division Bench of this Court has considered the case of R.D Sethi v. International Airport Authority, AIR [1979] SC 1628 and Ajay Hasia v. Khalid Mujid [Supra] and other relevant decisions on the issue. After considering all decisions and the Memorandum of Association of GSFC, the Division Bench of this Court has come to the conclusion that the Appellant-GSFC is not a `State' or `other authority' under Art. 12 of the Constitution and that all the provisions of Art. 21 are also not attracted. Thereafter, Mr. Nanavati has placed reliance upon a decision in case of Chandra Mohan Khanna v. National Council of Research & Training & Ors., reported in AIR (1992) SC 76. The relevant observations made in the said decision are reproduced hereunder :-

> `Article 12 should not be stretched so as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression `State'. A wide enlargement of the meaning must be tempered by a wise limitation. It must not be lost sight of that in the modern concept of welfare State, independent institution, corporation and agency are generally subject to State control. The State control does not render such bodies as `State' under Article 12. The State control, however, vast and pervasive is not determinative. The financial

> contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the State may largely point out that the body is `State'. If the Government operates behind a corporate veil, carrying out governmental activity and governmental functions of vital public importance, there may be little difficulty in identifying the body as `State' within the meaning of Art. 12.
>
> As the activities of the National Council of Educational Research & Training comprising undertaking several kinds of programmes and activities connected with the co-ordination of research extension services and training and dissemination of improved educational techniques, collaboration in the educational programmes and preparation of and publication of books are not wholly related to governmental functions and its Executive Committee can enter into arrangements with Government, public or private organisations or individuals in futherance of the objectives of the implementation of programmes and is free to apply its income and property towards the promotion of its objective and implementation of its programes and government control is confined only to the proper utilization of the grant given by it which is one of the sources of its funds, the organisation is not State within meaning of Art. 12 but is largely an autonomous body.'

In the said decision, the Apex Court has followed the verdict in the matter between Tekraj Vasandhi alias KL Basandhi v. Union of India, (1988) 2 SCR 260 :: AIR (1988) SC 469.

On the other side, learned advocate Mr. Sinha has relied upon a decision in the matter of Ajay Hasia v. Khalid Mujib Sehravardhi [Supra] and submitted that the decision of the Apex Court fully and squarely covers the issues which arises in the present petition. He also submitted that all the tests which have been specified by the Apex Court have been satisfied in the present petition. In support therof, he relied upon paragraph 15 of the said decision which reads thus -

`15. It is in the light of this discussion that we must now proceed to examine whether the Society in the present case is an `authority' falling within the definition of `State' in Article 12. Is it an instrumentality or agency of the Government ? The answer must obviously be in the affirmative if we have regard to the Memorandum of Association and the Rules of the Society. The composition of the Society is dominated by the representatives appointed by the Central Government and the Governments of Jammu & Kashmir, Punjab, Rajasthan and Uttar Pradesh with the approval of the Central Government. The monies required for running the college are provided entirely by the Central Government and the Government of Jammu & Kashmir and even if any other monies are to be received by the Society, it can be done only with the approval of the State and the Central Governments. The Rules to be made by the Society are also required to have the prior approval of the State and the Central Governments and the accounts of the Society have also to be submitted to both the Governments for their scrutiny and satisfaction. The Society is also to comply with all such directions as may be issued by the State Government with the approval of the Central Government in respect of any matters dealt with in the report of the Reviewing Committee. The control of the State and the Central Governments is indeed so deep and pervasive that no immovable property of the Society can be disposed of in any manner without the prior approval of both the Governments. The State and the Central Governments have even the power to appoint any other person or persons to be members of the Society and any member of the Society other than a member representing the State or Central Government can be removed from the membership of the Society by the State Government with the approval of the Central Government. The Board of Governors which is incharge of general superintendence, direction and control of the affairs of Society and of its income and property is also largely controlled by nominees of the State and the Central Governments. It will thus be seen that the State Government and by reason of the provision of approval, the Central Government also, have full control of the working of the Society and it would not be incorrect to say that the Society is merely a projection of the State and the Central

Governments and to use the words of Ray, C.J. in Sukhdev Singh's case [AIR 1975 SC 1331] the voice is that of the State and the Central Governments and the hands are also of the State and the Central Governments. We must, therefore, hold that the Society is an instrumentality or the agency of the State and the Central Governments and it is an `authority' within the meaning of Article 12.'

`9. The tests for determining as to when a corporation can be said to be a instrumentality or agency of Government may now be called out from the judgment in the International Airport Authority's case. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the International Airport Authority's case as follows:-

(1) "One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government."

(2) "Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character."

(3) "It may also be a relevant factor.....whether the corporation enjoys monopoly status which is the State conferred or State protected."

(4) "Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality."

(5) "If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government."

(6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government."

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would, as pointed out in the International Airport Authority's case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12.

10. We find that the same view has been taken by Chinnappa Reddy, J. in a subsequent decision of this court in the U. P. Warehousing Corporation v. Vijay Narain and the observations made by the learned Judge in that case strongly reinforced the view we are taking particularly in the matrix of our constitutional system.

11. We may point out that it is immaterial for this purpose whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a Government Company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute. Whatever be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society

and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article 12.

12. It is also necessary to add that merely because a juristic entity may be an "authority" and therefore "State" within the meaning of Article 12, it may not be elevated to the position of "State" for the purpose of Articles 309, 310 and 311 which find a place in Part XIV. The definition of "State" in Article 12 which includes an "authority" within the territory of India or under the control of the Government of India is limited in its application only to Part III and by virtue of Article 36, to Part IV: it does not extend to the other provisions of the Constitution and hence a juristic entity which may be "State" for the purpose of Parts III and IV would not be so for the purpose of Part XIV or any other provision of the Constitution. That is why the decisions of this Court in S. L. Aggarwal v. Hindustan Steel Ltd. and other cases involving the applicability of Article 311 have no relevance to the issue before us. '

Mr. Sinha has relied upon a decision in the matter of R.D Shetty v. International Airport Authority, (1979) 3 SCC 489 : AIR 1979 SC 1628 wherein in paragraph no. 19, the Court has observed as under :-

`19. It will thus be seen that there are several factors which may have to be considered in determining whether a corporation is an agency or instrumentality of Government. We have referred to some of these factors and they may be summarised as under : whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance whether there is any other form of assistance, given by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State protected monopoly status and whether the functions carried out by the corporation are public functions closely rated to governmental functions. This particularisation of relevant factors is however not exhaustive and by its very nature it cannot be because with increasing assumption of new

> tasks, growing complexities of management and administration and the necessity of continuing adjustment in relations between the corporation and Government calling for flexibility, adaptability and innovative skills, it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a corporation is governmental agency or instrumentality. Moreover, even amongst these factors which we have described, no one single factor will yield a satisfactory answer to the question and the Court will have to consider the cumulative effect of these various factors and arrive at its decision on the basis of a particularised inquiry into the facts and circumstances of each case.... It is not enough to examine seriatim each of the factors upon which a corporation is claimed to be an instrumentality or agency of Government and to dismiss each individually as being insufficient to support a finding to that effect. It is the aggregate or cumulative effect of all the relevant factors that is controlling.'

Mr. Sinha has also placed reliance upon a decision of the Apex Court in the matter of P.K Ramchandra Iyer v. Union of India & Ors., AIR (1984) SC 541 wherein it is held that, `Indian Council of Agricultural Research [ICAR for short] and its affiliate Indian Veterinary Research Institute [IVRI for short] are such other authorities as would be comprehended in the expression `other authority' in Art. 12 of the Constitution. There is little doubt that ICAR is an instrumentality of or the agency of the State. Therefore, writ petition against same is maintainable. .. ICAR came into existence as a department of the Government, continued to be an attached Office of the Government even though it was registered as a society under the Societies Registration Act and wholly financed by the Government and the taxing power of the State was invoked to make it financially viable and to which independent research institutes set up by the Government were transferred. Thus, ICAR being almost an inseparable adjunct of the Government of India having an outward form of being a Society, it could be styled as a Society set up by the State and therefore would be an instrumentality of the State.' Mr. Sinha has also placed reliance upon a decision of Allahabad High Court in case of Deepak Ganguly v. Union of India & Ors., reported in 1997 Lab.IC 3393 wherein the decision of the Apex Court

in the matter of International Airport Authority has been followed. In the said matter, the High Court has observed that geology institute - government bearing major finance and exercise of deeper and perverse control over functioning of the Institute - Said Institution can be said to be an instrumentality of the State. He also placed reliance upon a decision of Allahabad High Court in the case of Bageshwari Prasad Srivastava & Ors. v. State of UP & Ors., reported in 1999 (II) CLR 417 wherein it is held that, `Bhadohi Woollens Limited was a Government Company. Its shares, in entirety, were held by UP State Textile Corporation Limited and U.P Export Corporation Limited. Since Bhadohi Woollens Limited was owned and controlled by aforesaid two Government Corporations, whose affairs were fully owned and controlled by the State, it was a Government company as defined in Art. 12 and therefore amendable to writ jurisdiction of the High Court.' Mr. Sinha has also placed reliance upon a decision in the matter of Suresh Chandra Singh & Ors. v. Fertilizer Corporation of India Limited & Ors., reported in 1999 Lab.IC 1680 wherein the Division Bench of Allahabad High Court has held that, `Fertilizer Corporation of India Limited [FCIL for short] is a company wholly owned by the Government of India. 100 per cent shares of the company are held by the President of India. The Memorandum of Association shows that the Secretary and Joint Secretary of the Ministry of Commerce, Government of India constituted the company which was to have share capital of 800 crores of rupees. Articles of Association defined the corporation to include the Government. The Articles prohibit any invitation for public to subscribed for any shares or debentures. The other relevant clauses of the Articles show that (i) the entire share capital is owned by the President of India ie., the Union of India; (ii) The President representing the Union of India has complete control over the management and affairs of the company because he has the authority to appoint and remove the directors who will constitute the Board of Directors, (iii) the President by virtue of Art. 66 (3) of the Articles of Association has the power to remove any Director including the Chairman, Managing Director, the Executive Director, etc., at any time and in his absolute discretion, (iv) Chairman of the Corporation has to be appointed by the President in terms of Art. 77 and (v) the accounts of the Corporation have to be audited by an Auditor appointed by the Central Government on advice of the Controller and Auditor General of India who has power to direct the manner in which the company's account shall be audited by an Auditor. Then under Art. 110 the President has the power to issue directives to the

company and the Directors are required to give immediate effect to the Directives so issued. The aforesaid features leave no doubt that it is the Government of India that is functioning with the instrumentality of a company incorporated under the Companies Act and it is a `State' and authority within the meaning of Art. 12 of the Constitution of India. FCIL is a `State' or authority within the meaning of Art. 12 of the Constitution of India and is amenable to writ jurisdiction of this Court.'

Lastly, Mr. Sinha has relied upon a decision rendered by Full Bench of Karnataka High Court in the matter of Mysore Paper Mills Limited, Bangalore v. Mysore Paper Mills Officers Association, Bhadravathi & Anr., reported in 1998 Lab.IC 3203 wherein the very same question as to whether Mysore Paper Mills Limited is a State within the meaning of Art. 12 of the Constitution of India or not was under consideration. While considering the said question, the Full Bench has relied upon various decisions in the matter of Ajay Hasia [Supra], Re :International Airport Authority [Supra], AIR India Statutory Corporation [AIR 1997 SC 645] and Manmohan Singh v. Commissioner, Union Territory [AIR 1985 SC 364], and NCERT [AIR 1992 SC 76]. In the latest decision of the Supreme Court in AIR India Statutory Corporation [Supra], it is held :

`(C) Contract Labour [Regulation & Abolition] Act (37 of 1970), S. 2 (1)(a) - Appropriate Government Corporation, Instrumentality or agency - If under control of an appropriate Government Principles for determination laid down.

(1) The constitution of the Corporation or instrumentality or agency or Corporation aggregate or Corporation sole is not a sole material relevance to decide whether it is by or under the control of appropriate Government under the Act.

(2) It is a statutory Corporation, it is an instrumentality or agency of the State. if it is a company owned wholly or partially by a share capital, floated from public exchequer, it gives indicia that it is controlled by or under the authority of the appropriate Government.

(3) In commercial activities carried on by a Corporation established by or under the control

of the appropriate Government having protection under Arts. 14 and 19 (2), it is an instrumentality or agency of the State.

(4) The state is a service Corporation. Its acts through its instrumentalities, agencies or persons natural or juridical.

(5) The governing power, wherever located, must be subject to the fundamental constitutional limitations and abide by the principles laid in the Directive principles.

(6) The framework of service regulations made in the appropriate rules or regulations should be consistent with and subject to the same public law principles and limitation.

(7) Though the instrumentality, agency or person conducts commercial activities according to business principles and are separately accountable under their appropriate bye laws of Memorandum of Association, they become the arm of the Government.

(8) The existence of deep and pervasive State Control depends upon the facts and circumstances in a given situation and in the altered situation it is not the sole criterion to decide whether the agency or instrumentality or person is by or under the control of the appropriate Government.

(9) Functions of an instrumentality, agency or person are of public importance following public interest element.

(10) The instrumentality agency or person must have an element of authority or ability to effect the relations with its employees or public by virtue of power vested in it by law, memorandum of association or bye laws or articles of association.

(11) The instrumentality, agency or person renders an element of public service and is accountable to health and strength of the works, men and women, adequate means of livelihood, the security for payment of living wages, reasonable conditions or work, decent standard of life and opportunity to enjoy full leisure and social and cultural activities to the workmen.

(12) Every action of the public authority, agency or instrumentality or the person acting in public interest or any act that gives rise to public element should be guided by public interest in exercise of public power or action hedged with public element and is open to challenge. It must meet the test of reasonableness, fairness and justness.

(13) If the exercise of the power is arbitrary, unjust and unfair, the public authority, instrumentality agency or the person acting in public interest, though in the field of private law, is not free to prescribed any unconstitutional conditions or limitation in their actions.

The question whether a Government Company which carries on a trading activity can be considered as a `State' within the meaning of the expression used in Art.. 12 of the Constitution of India came up for consideration in a decision in the matter of Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly and Central Inland Water Transport Corporation Limited, reported in AIR 1986 SC 1571 wherein it is held :

`(A) Constitution of India, Art. 12 Expression, `the State' in Art. 12 Interpretation of - Definition of Expression `the State' in Art. 12 being for purpose of Part III and part IV expression is not confined to its ordinary and constitutional sense as extended by inclusive portion of Art. 12 but used in the concept of the State in relation of Fundamental Rights guaranteed by Part III and Directive Principles of State Policy contained in Part IV which are declared by Art. 37 to be fundamental to governance of the Country.

If there is an instrumentality or agency of the State which has assumed the garb of a Government Company as defined in Sec. 617 of the Companies Act, it does not follow that it thereby ceases to be an instrumentality or agency of the State. For the purpose of Art. 12 one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an

instrumentality or agency or the State.'

In paragraph 8 of the judgment, the Full Bench of Karnataka High in the case of Mysore Paper Mills Limited [Supra] has gone deep into the matter and considered the objects of the said Company. After considering the various objects for which it is established, the Court in its judgment at paragraph 9 has observed thus :

`9. Thus, it is seen from the above ojects that one of the objects of the said Government Company is to carry on business of manufacture of news printing papers which is the monopoly of the State, since no other company is allowed to produce news print in State of Karnataka. It is also seen from object No. 5A that the appellant company is entrusted with an important programme of Rural Development including Programme of promoting the social and economic welfare or the uplift of the people in any rural areas. Article 5B indicates that the appellant-company is entrusted with duty to undertake, carry out and sponsor or assist any activity for the promotion and growth of the national economy and it is entrusted with the social and moral responsibility to the public in such manner and by such means, as the Director thinks fit. etc. The above Articles 5A and 5B are newly introduced in the memorandum of association of the appellant. Thus it is found from the above objects that the appellant company is entrusted with an important function of public importance closely related to governmental functions and it enjoys monopoly status which is state conferred. The above functions entrusted to the appellant Company clearly go to show that the Government operates behind a corporation veil carrying out Governmental function of vital indentifying the appellant Company as `State' within the meaning of Art. 12 of the Constitution.'

After considering the submissions of both the learned advocates and also considering the various decisions rendered by the Apex Court as well as Full Bench of Karnataka High Court and Division Bench of this Court in the matter of GSFC, and also the merits of the present case, the main contention raised herein being that the respondent Institute is not a `State' within the meaning of Art. 12 of the Constitution of India on the following grounds that :

(a) that it is an autonomous body having its own Governing Council;

(b) that it is a society registered under the Societies Act;

(c) that the Government has no control over the activities of the Institute;

(d) that NID does not perform any Governmental function;

(e) that NID generates its own revenue apart from the grants given by the Government.

(f) that the case of NID is covered by the facts and law as decided by the Supreme Court of India in the case of NCERT.

While arguing the matter, learned counsel for respondent Institute has however admitted that the Government has full control over the expenditures incurred by the Institute but merely because Government exercises control over the finances given by the Institute as grant-in-aid, it was argued that NID is not a State.

The petitioners have submitted that the Supreme Court in the case of NCERT case has not laid down any test for determining as to when a body can be qualified as a State. Tests were laid down by the Supreme Court in the case of International Airport Authority's case [Supra]. The tests laid down by the Supreme Court in the said matter were fully approved by the Constitutional Bench of Apex Court in the case of Ajay Hasia v. Khalid Mujib Sehravardi & Ors. [Supra]. The relevant paragraph 9 of the said judgment lays down the tests which are set out here :-

`9. The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgment in the International Airport Authority's case [Supra]. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression `other authorities', it must be realised that it should not be stretched so far as to bring tin every autonomous body which has

some nexus with the Government with the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarize the relevant tests gathered from the decision in the International Airport Authority's case as follows :

(1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor .. whether the Corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence of deep pervasive State Control may afford an indication that the Corporation is a State agency or instrumentality.

(5) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government.

If on a consideration of these relevant factors it is found that the Corporation is an instrumentality or agency of government, it would as pointed out in the International Airport Authority's case, be an `authority' and therefore, `State' within the meaning of the expression in Article 12.

To determine as to whether NID is qualified to be a State within the meaning of Art. 12, the facts on record have to conform to the above six tests.

Test No. 1

Regarding the first test, it is an admitted position that NID is a Society Registered under the Societies Act and the entire capital grant for creating the Institute as well as the land on which it is set up are given by the Central Government and the State Government respectively. The Articles of the Memorandum of Association as well as the facts stated in paragraph 2 of the Affidavit filed by the Institute before the Supreme Court of India in SLP NO. 7003 of 1998, at page 183 of the paper book establish that the Institute was set up and established by the Government of India for the purposes mentioned in the Memorandum of Association and by the clauses 55 and 56 of the Memorandum, the purposes cannot be altered without the approval of the Government of India and the Society also cannot be dissolved without the consent of the Government of India. Thus, the birth as well as the death of the Society are wholly within the control of the Government of India and any alteration during its existence is also under the control of the Government of India. There is no contention made anywhere that any private party has contributed even a paisa for creation of the NID and therefore the first test is fully satisfied.

Test No.2

The second test pertains to financial assistance. It is once again established by facts that the entire financial assistance - both capital as well as recurring expenditure - are given by the Central Government. No contention has ever been raised by the Institute that any private party gives any contribution. The revenue generated by the Institute is, therefore, on the basis of the grant of the Government and therefore cannot be considered independent of the grants. The respondents has in fact admitted that Government has complete control over the finances of the Institute to the extent of even determining every service condition of its employees.

Test No. 3

The third test is as to whether the respondent Institute enjoys monopoly status. It can be seen that this is not a determinative test. In any case even this

condition is fulfilled by Institute in the sense that NID is the only Institute which is recognized by the Department of Science & Technology which has permitted the Institute to carry on research on industrial designs and train the main-power for the purpose and confer diplomas. There is no other Governmental Institute which is doing any research in industrial design except the respondent Institute.

Test No. 4

So far as 4th test regarding existence of deep and pervasive State control over NID, the following facts are established from the Memorandum of Association :

(a) The objects and purposes for which the Society is established cannot be altered without the approval of the Government as provided in clause 55 of the Memorandum.

(b) Under clause 4 of the Memorandum, Government of India can appoint persons to review the work and progress of the Society and to hold inquiries into the affairs thereof and to report thereon in such manner as the Government of India may stipulate. Upon receipt of such report, the Government of India may take such action and issue such directions as it may consider necessary in respect of any of the matters dealt with in the report and the society shall be bound to comply with such directions.

(c) Control over the Society : Under Rule 3 of the Rules, the Society would consist of a Chairman of the Governing Council, Members of the Governing Council and persons appointed by the Government of India. By Rule 7 (c) Government of India may terminate the membership of any member or at one and the same the membership of all members of the society and any vacancy in membership of the society can be filled up by the Government. Thus, the Society itself is fully under the control of the Government of India including power of the Government to remove any or all the

members or fill up any vacancy.

(d) Control over the Management : The management of respondent Institute is under the control of a Governing Council members of which are nominated under Rule 26 (b) and which is primarily composed of representatives of the Ministry of Industry, Ministry of Education, Ministry of Finance, Government of Gujarat, Mayor of Ahmedabad City and a Chairman to be nominated by the Central Government. Other members of the Council are also to be nominated by the Central Government under Rule 26 (b) (vii) save and except three members.

(e) Under Rule 40, the rules of the Society can be amended or repealed only by approval of the Government of India.

(f) Under Rule 29 (a) any vacancy in the membership of the Governing Council shall be filled up by appointment by the Government of India and under non-official members of the Governing Council shall hold office for a period of three years only unless reappointed by the Government under Rule 29 (b). Under Rule 29 (c) Government of India may terminate the membership of any member or at one and the same time of all members other than the ex officio members.

On the aforesaid facts, it can be seen that the management and administration of the Society is under the complete control of the Government of India though being an autonomous Institute cannot take any decision which is outside the objects of the Society nor can it change the objects of the Society without the approval of the Government of India. In fact, the Society cannot be dissolved without the approval of the Government of India.

Test No. 5

The fifth test is whether the functions of NID are closely related to Governmental functions or not ?

It can be seen from the objects of the Society as shown in the Memorandum itself show that each of the

object is of vital public importance. The following objects are some of the objects of the respondent Institute :-

`3. The objects for which the Society is established are :

(a) to provide service, training and research in the field of design in industry (large medium, small scale, handicrafts, etc.) graphic arts, architecture, city planning and other allied fields;

(b) to establish, equip and maintain workshops, laboratories or factories with modern machinery and equipments in order to undertake scientific and technological research for the production of goods and the optimum exploitation of raw materials and processes, and to provide funds for such works and for payment to any person or persons engaged in service, training and research work whether in such workshops or elsewhere.

(c) to encourage and improve education of persons who are engaged or are likely to be engaged in the service, training or research activities in which the Society is interested by grant of loans, scholarships or other monetary assistance or otherwise howsoever;

(d) to prepare, print, publish, issue, acquire and circularize books, papers, periodicals, exhibits, films, slides, gazettes, circulars and other literary undertakings, dealing with or having a bearing upon the subject of Industrial Design and allied fields.

(e) to establish, form and maintain Museums, Libraries and collections of literature, films, slides, photographs, prototypes, and other information relating to design and allied subjects.

(f) to investigate and make known inventions or improvements in designs, operations, etc.'

From the aforesaid objects, it can be seen that these objects are not only Governmental functions but are in the realm of sovereign functions of the State.

In fact, the objects of the Regional Engineering College which came to be examined by the Constitutional Bench in the case of Ajay Hasia [Supra] would fall far short of the objects of the respondent Institute. It is obvious that these are not only Governmental functions but to carry out such functions, permission of the Planning Commission itself is necessary which can be seen from the statement made in the Annual Report for the year 1996-97. It has been stated that NID's forward plans for the years 1997-2000 had to be placed before the Ministry as well as the Planning Commission which has accepted in principle the introduction of new programmes at NID during the 9th Plan period. It goes without saying that if the functions of NID are to be part of a Plan Period of the Government of India and has to have prior approval of the Planning Commission and the Ministry, such functions can hardly be described as `private functions' as being contended by the respondents.

The comparison of NCERT case with the present case is absolutely out of place in as much as NCERT was created as an advisory body to advice the Government and as the term itself would suggest, the Government of India could hardly control the functions of NCERT which would otherwise mean controlling the advice it is supposed to give to the Government of India. In the instant case, the respondent Institute is purely an extended limb of the Government of India, and more particularly, the Ministry of Industry which is carrying out an extremely important Government function of Research in and Development of Industrial Design through the agency of the Institute.

Test No. 6

So far as the last test is concerned regarding an Organisation being Department of the Government of India transferred to a new corporate name, this test obviously is not determinative test as indicated by the Supreme Court since if such a fact existed, then it would be a strong factor to support the inference that the organisation is a State. It is, however, not the ratio laid down by the Supreme Court that if such a factor did not exist, it can have a negative indication. In fact there are several organisations which are held to be

State like PRL, Regional Engineering College in the case of Ajay Hasia [Supra], Central Inland Water Transport Corporation [Supra] which were not departments transferred into new corporate name, yet have been held as `State'.

It is necessary to consider some of the observations made by the Apex Court in respect to the subject matter.

`The meaning of the word `authority' given in Webster's Third New International Dictionary, which can be applicable is a `public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue-producing public enterprise'. The dictionary meaning of the word `authority' is clearly wide enought to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions. The expression `other authorities' is wide enough to include within it every authority created by a statute and functioning within the territory of Indian, or under the control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words `other authorities' are used in Article 12 of the Constitution.

The expression `other authorities' in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities. Under the Constitution, the State is itself envisaged as having the right to carry on trade or business as mentioned in Article 19 (1)(g). In part IV, the State has been given the same meaning as in Article 12 and on of the Directive Principle laid down in Article 46 is that the state shall promote with special care the educational and economic interest of the weaker sections of the people. The State, as define in Article 12, is thus comprehensive to include bodies created for the purpose of promoting the educational and economic interests of the people. The State, as constituted by our Constitution, is further specifically empowered under Article 298 to carry on any trade or business.

In such cases `the true owner is the State, the real operator is the State and the effective controller is the State and accountability of its action to the community and to the Parliament is of the State.

We cannot by a process of indicial construction allow the Fundamental Rights to be rendered futile and meaningless and thereby wipe out Chapter III from the Constitution.

For the purpose of Article 12 one must necessarily see through the corporate veil to asscertain whether behind that veil is the face of an instrumentality or agency of the State. The Corporation squarely falls within these observations, and it also satisfies the various tests which have been laid down. {ibid at p.202 SCC : 1601 (AIR)}. It is nothing but the government operating behind a corporate veil, carrying out a governmental activity and governmental functions of vital public importance. There can thus be no doubt that the Corporation is `the State' within the meaning of Article 12 of the Constitution.

In view of the above observations made by the Apex Court, the determinative tests Nos. 1,2,4 & 5 are fully satisfied in the facts and circumstances of the instant case, and therefore, respondent-National Institute of Design is certainly an instrumentality and agency of the `State' within the meaning of Art. 12 of the Constitution of India.

It is also necessary to consider another aspect which this Court has considered in one of the similar set of facts in the matter of Indian Institute of Management wherein the similar question as to whether IIM is a `State' or not within the meaning of Art. 12 of the Constitution of India, came to be decided by this Court [Coram : Hon'ble Mr. Justice J.N Bhatt] has held that IIM is a `State' within the meaning of Art. 12 of the Constitution [Re : Special Civil Application No. 6845 of 1987 decided on 24th October, 1991].

Learned Sr. advocate Mr.Nanavati has raised another contention that petitioners are having alternative efficacious remedy before the Industrial Court in case it is their grievance that the 2-P settlement or the service rules have been violated by the respondent institute. Now, the very contention has been examined by the Division Bench of this Court in case of K.S Joy v. Indian Institute of Management & Ors., reported in 1994 (1) GLR 57 wherein it is held that, `once the petition is entertained by the High Court on merits, it would not be proper to relegate the party to an alternative remedy - Availability of an alternative adequate remedy does not oust the jurisdiction of the High Court - Relegating the petitioner to alternative

remedy after about 4 and half years, would not be an adequate efficacious remedy.' It is further observed by the Court that, `moreover, it maybe noted that availability of an alternative adequate remedy and exhausting of the same before resorting to a petition under Art. 226 of the Constitution of India does not oust the jurisdiction of the Court. In the case of Ram & Shyam Company v. State of Haryana & Ors., AIR 1985 SC 1147, the Supreme Court has, inter alia, observed that the Courts have imposed a restraint in its own wisdom on exercise of jurisdiction under Art. 226 where the party invoking the jurisdiction has an effective, adequate alternative remedy. More often, it has been expressly stated that the rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than rule of law. At any rate it does not outst the jurisdiction of the Court.' In the present case, the suspension order dated 30th November, 1987 has been challenged by the petitioners in the present Special Civil Application and after a period of about 12 years, it is not in the interest of justice to relegate the petitioners for alternative remedy. However, considering the provisions of Industrial Disputes Act, 1947, the petitioners, as an individual employees, cannot challenge the suspension order directly under the machinery of the said Act. There is only one provision under Sec. 2 (A) of the Act which gives right to an individual to raise an industrial dispute in case of dismissal, discharge or retrenchment or otherwise termination of service. Except the said provision, Sec. 2 (A), there is no other provision under the Industrial Disputes Act which gives right to the petitioners [as an individual employee] to challenge the suspension order before the appropriate forum under the machinery of Industrial Disputes Act; except to approach the Union which can only raise the same. However, that cannot be considered to be an adequate, effective alternative remedy because if an individual employee is not a member of any Union then he cannot have alternative effective remedy to challenge the very suspension order under the machinery of Industrial Disputes Act. Therefore, even on merits, according to my opinion, the petitioner does not have adequate effective and alternative remedy to challenge the suspension order before the appropriate forum under the provisions of I.D Act, 1947. However, after 12 years, it is not in the interest of justice to relegate the petitioners to approach the forum provided under the I.D Act. Therefore, the said contention of Mr. Nanavati cannot be accepted. The same is, therefore, rejected.

Mr. Nanavati has raised another contention that

the 2-p settlement arrived at between the Association and the respondent Institute dated 14th December, 1984 and as per the Item No. 6, the service rules becomes part and parcel of the said 2-p settlement. Mr. Nanavati has pointed out that respondent Institute is governed by the Model Standing Orders and the same is applicable to the Institute, and therefore, the suspension orders have been passed on 30th November, 1987 under the provisions of Rule 25 (5) (a) of the Model Standing Orders. Mr. Nanavati pointed out that in case of any conflict between the Service Rules and the Standing Orders, in such a situation, the provisions made in the Standing Orders shall prevail upon the settlement. He relied upon a decision of the Apex Court in case of Western India Match Company Limited v. Workmen, reported in (1974) 3 SCC 330 wherein he has placed emphasis over the observations made by the Apex Court in paragraph nos. 7 & 8 which reads thus :

> `7. The terms of employment specified in the Standing Order would prevail over the correspondent terms in the contract of service in existence on the enforcement of the Standing Order. It was in effect so held in the Agra Electric Supply Co Limited v. Shri Alladin, Avery India Limited v. Second Industrial Tribunal West Bengal and the United Provinces Electric Supply Co Limited, Allahabad v. Their Workmen. While the Standing Orders are in force, it is not permissible to the employer to seek statutory modification of them so that there may be one set of standing orders for some employees and another set for the rest of the employees.
>
> 8. If a prior agreement, inconsistent with the Standing Orders will not survive, an agreement posterior to and inconsistent with the Standing Order should also not prevail. Again, as the employer cannot enforce two sets of Standing Orders governing the classification of workmen, it is also not open to him to enforce simultaneously the Standing Order regulating the classification of workmen and a special agreement between him and an individual workman settling his categorization.'

Against the said contention, Mr. Sinha has submitted that such a contention is an afterthought though on two occasions, the respondent Institute has admitted before this Court that the suspension order has

been passed under the provisions of service rules. After reading the order dated 30th November, 1987 it appears that the the petitioners will be paid subsistence allowance as per the rules applicable to them and before the Division Bench at page 49, it is categorically mentioned that it is not disputed that under Rule 4.3 of the Rules for disciplinary action for any misconduct, the appellants have power to suspend an employee. Therefore, it is clear from the above observations that the suspension order which has been passed by the respondent Institute against the petitioner on 30th November, 1987 under Rule 4.3 which was part and parcel of 2-p settlement dated 14th December, 1984. However, Mr. Sinha pointed out that the Model Standing Orders of Gujarat State Rules for the category of workmen being manual and technical work, clause 32 of the Model Standing Orders provide that, `nothing contained in this Standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage or an agreement, settlement or award applicable to the establishment'. Therefore, Mr. Sinha submitted that if the petitioner is having better right in his favour on the basis of 2-p settlement and service Rule 4.3 then the provisions of Standing Orders which is relied upon by the respondent Institute, particularly clause 25 (5)(a), cannot be held to be applicable in light of the provisions made in the very Standing Orders, under Clause 32. Therefore, considering Clause 32, the settlement prevails over and not the Standing Orders, and therefore, the petitioners are entitled to take a recourse and rely upon the relevant service rules, which are part and parcel of 2-p settlement dated 14th December, 1984.

Now, the important issue is that before suspending the petitioners from service on 30th November, 1987, whether the service rule 4.3 has been duly followed by the respondent Institute or not ? and before passing the orders on 18th March, 1988 reducing the subsistence allowance @ 1/4th of the salary of the petitioners is as per the provisions of Clause 4.4 of the Institute's General Services Rules or so ? It is also important to note that the subsistence allowance has been reduced by the respondent Institute by an order dated 18th March, 1988 not under the provisions of the Standing Orders but under the provisions of NID General Service Rule 4.4 (a). Therefore, the contention of the respondent Institute that the Model Standing Orders are applicable and suspension orders have been passed under the relevant Model Standing Orders is an afterthought and the same cannot be accepted because at the time of suspending the

petitioners relevant Service Rule 4.3 has been exercised and at the time of reduction of their subsistence allowances, Rule 4.4 (a) has been made applicable, and therefore also, the said contention cannot be accepted. The relevant Service Rule 4.3 provide that where a disciplinary proceedings against an employee is contemplated or is pending or where criminal proceedings against him in respect to any offences are under investigation or trial and the Institute authorities are satisfied, after prima facie investigation and due opportunity of explanation given to the concerned employee that, it is necessary or desirable to place the employee under suspension, he may by order in writing be suspended by the competent authority with effect from such date as may be specified in the order. A statement setting out in detail the reasons for such suspension will also be recorded. After considering the relevant service Rule 4.3 and the suspension order which has been passed by the respondent-Institute on 30th November, 1987, it is an immediate result of the incident occurred on 30th November, 1987. The alleged incident has occurred on 30th November, 1987 itself and on the very same day, the respondent-Institute has suspended the petitioners from service and prior to that, no opportunity of explanation is given to the petitioners and no reasons have been recorded by the competent authority for suspending the petitioners from service. There was no prima facie investigation made by the respondent-Institute prior to suspending the petitioners from service. It is not a technical breach of service rules but it is a fundamental and vital breach of service rules because before suspending the employees as per Rule 4.3, two things are necessary viz., that the authority must be satisfied after having prima facie investigation. In the present case, there was no prima facie investigation made by the authority before passing the suspension order against the petitioners. The second thing is that after satisfying the reasonable opportunity must be given to the employee concerned for explanation and thereafter authority should have to record detailed reasons for such suspension. Therefore, before passing the suspension orders, the basic principles of natural justice have not been followed. Therefore, in the present case, there was no prima facie investigation made by the respondent-Institute and no reasonable opportunity of explanation was given to the petitioner and no detailed reasons have been recorded by the authority. In such a situation, the service rules having very prime importance has been considered by the Apex Court in the case of P.R Naik v. Union of India, reported in AIR (1972) SC 554. The relevant paragraph no. 15 reads thus

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`15. In our view, the second contention possesses merit and deserves to be upheld. In case we uphold this contention it would be unnecessary for us to express any considered opinion either way on the other contentions. Rule 3 of the All India Services (D & A) Rule 1 969, which has already been set out in extensor, provides for suspension during disciplinary proceedings. Sub-rule this rule on its plain reading empowers the Government, which initiates any disciplinary proceedings on being satisfied, having regard to the nature of the charges and the circumstance, of the necessity, or desirability of placing under suspension, the member of the Service against whom such proceedings are started, to pass an order placing, him under suspension or if he is serving under another Government to request that Government to suspend him. (emphasis supplied). It does not suggest that suspension can be ordered merely when disciplinary proceedings are contemplated. The language used in sub-rr. (4) to (7) also suggests that these rules do not authorise order of suspension of the delinquent member of the Service merely because disciplinary proceedings against him are contemplated. Suspension under those sub-rules may be ordered only either after conviction. (deeming provision tinder sub-r. 4) or when criminal proceedings are actually in progress (sub-r. 5) or when after the penalty imposed on him having been set aside, the disciplinary authority decides to hold further enquiry (deeming provision under sub-r. 6). Clause (b) of sub-r. (7) similarly provides for continuation of order of suspension. If any other,disciplinary proceeding is commenced against the delinquent member of the service. during the continuance of the earlier suspension-actual or deemed. The legislative scheme underlying r. 3 is thus clearly indicative of the intention of the rule making authority to restrict its operation only to those cases in which the Government concerned is possessed of sufficient material whether after preliminary investigation or otherwise and the disciplinary proceedings have in fact commenced and not merely when they are contemplated An order of suspension before the actual initiation

or commencement of disciplinary proceedings appears to us, therefore, to be clearly outside the ambit of Y. 3 and we find no cogent ground for straining the plain language of r. 3 (1) so as to extend it to cases ill which disciplinary proceedings are merely contemplated and not actually initiated or commenced. '

`18. There is no gainsaying that there is no inherent power of suspension postulated by the Fundamental Rules or any other rule governing the appellant's conditions of service. Except for Rule 3 of the AIS (D&A) Rules, 1969, no other rule nor any inherent power authorizing the impugned order of suspension was relied upon in this court in its support. Therefore, if Rule 3, which is the only Rule on which the appellant's suspension pending disciplinary proceedings can be founded, does not postulate the order of suspension before the initiation of the disciplinary proceedings and the Government initiating such proceedings can only place under suspension the member of the service against whom such proceedings are started, then, the impugned order of suspension which in clearest words merely states that disciplinary proceedings against the appellant are contemplated, without suggesting actual initiation or starting of disciplinary proceedings must be held to be outside this rule. The impugned order of suspension, it may be pointed out, is not like an order of suspension which without adversely affecting the rights and privileges of the suspended government servant merely prohibits and restraints him from discharging his official duties of obligations. An order of that nature may perhaps be within the general inherent competence of an appointing authority when dealing with the government servant. The impugned order made under Rule 3 of A.I.S (D&A) Rules, 1969 on the other hand seriously affects some of the appellant's rights and privileges vesting in him under his conditions of service. To mention some of the disabilities resulting from his suspension, he is not entitled to get his full salary during suspension but he is only to be paid subsistence allowances and in certain circumstances some other allowances : in order to be entitled to the subsistence allowances he is prohibited from engaging in any other employment, business, profession or vocation

[vide Rule 4] : the appellant is not permitted to retire during the period of suspension : indeed the impugned order specifically prohibits even from leaving New Delhi during the period of suspension, without obtaining the previous permission of the Central Government. The fact that these prejudicial consequences automatically flow from the impugned order under the rules also land support to our view that the clear and explicit language of Rule 3 must not be so strained to the appellant's prejudice as to authorise an order of suspension on the mere ground that the disciplinary proceedings are contemplated. The precise words of Rule 3 are unambiguous and must be construed in their ordinary sense. The draughtsman must be presumed to have used the clearest language to express the legislative intention, the meaning being plain Courts cannot scan its wisdom or policy.'

Before coming to the final conclusion in the said matter, some of the observations made by the Apex Court in respect to subject matter are necessary to consider, which are as under :-

`The principles of statutory construction are well settled. Words occurring in statutes of liberal import such as social welfare legislation and Human Right's legislation are not to be put in procrustean beds or shrunk to Liliputain dimensions. In construing these legislation the imposture of literal construction must be avoided and the prodigality of its mis-application must be recognized and reduced. Judges ought to be more concerned with the `colour', the `content' and the `context' of such statutes. [We have borrowed the words from Lord Wilberforce's opinion in Prenn v. Simmonds, 1971 (3) All ER 237]. In the same opinion Lord Wilberforce pointed out that law is not to be left behind in some island of literal interpretation but is to enquire beyond the language, unisolated from the matrix of facts in which they are set; the law is not be interpreted purely on internal linguistic considerations. In one of the cases cited before us, that is, Surendra Kumar Verma v. Central Government, Industrial Tribunal cum Labour Court, we had occasion to say, `Semantic luxuries are misplaced in the interpretation of `bread and butter' statutes. Welfare statutes must, of necessity, receive a board interpretation. Where legislation is designed to give relief against certain kinds of mischief, the court is not to make inroads by making etymoligical excursions.

On joining Government service, a person does not mortgage or barter away his basic rights as a human being, including his fundamental rights, in favour of the Government. The Govt. only because it has the power to appoint does not become the master of the body and soul of the employee. The fundamental rights, including the Right to Life under Art. 21 of the Constitution or the basic human rights are not surrendered by the employee. The provision for payment of subsistence allowance made in the Service Rules only ensure non-violation of the right to life of the employee. The Government by providing job opportunities to its citizen only fulfils its obligation under the Constitution, including the Directive Principles of the State Policy. The employee, on taking up an employment only agrees to subject himself to the regulatory measures concerning his service. His association with Government or any other employer, like instrumentalists of the Government or Statutory or Autonomous Corporations, etc., is regulated by the terms of contract of service or service Rules made by the Central or the State Government under the proviso to Art. 309 of the Constitution or other Statutory Rules including certified Standing Orders.

To place an employee under suspension is an unqualified right of the employer. This right is concded to the employer in service jurisprudence everywhere. It has even received statutory recognition under service rules framed by various authorities, including Government of India and the State Governments [see : for example, Rule 10 of Central Civil Services (Classification, Control & Appeal) Rules. Even under the General Clauses Act, this right is conceded to the employer by Section 16 which, inter alia, provides that power to appoint includes power to suspend or dismiss.

The order of suspension does not put an end to an employee's service and he continues to be a member of the service though he is not permited to work and is paid only subsistence allowance which is less than his salary.

Service Rules also usually provide for payment of salary at a reduced rate during the period of suspension. The constitute the `subsistence allowance', if there is no provision in teh Rules applicable to a particular class of service for payment of salary at a reduced rate, the employer would be liable to pay full salary even during the period of suspension.

Exercise of right to suspend an employee may be

justified on the facts of a particular case. Instances, however, are not rare where officers have been found to be afflicted by `suspension syndrome' and the employees have been found to be placed under suspension just for nothing. It is their irritability rather than the employee's trivial lapse which has often resulted in suspension. Suspension notwithstanding, non payment of subsistence allowance is an inhuman act which has an unpropitious effect on the life of an employee. When the employee is placed under suspension, he is demobilized and the salary is also paid to him at a reduced rate under the nick name of `Subsistence Allowance', so that the employee may sustain himself.'

Considering the decision of the Apex Court and the observations made therein as well as observations made in respect to subject matter, it is clear that when the service rules provide specific conditions, the same must have to be observed strictly before suspending the concerned employee. Suspension itself is having adverse effect upon the employee in respect to his position and pay, and therefore, before passing the adverse orders against any employee, under a particular service rules, if any safeguard has been provided by the rule making authority, then such safe guard must have to be read and followed strictly and the slightest breach of such safe guard invalidates the order of suspension. Therefore, according to my opinion, the suspension order dated 30th November, 1987 passed by the respondent-Institute against each of the petitioner is violative of Service Rule 4.3. It also violates the principles of natural justice. Further, it also amounts to victimization because petitioner no. 2 is the General Secretary of the Association and the petitioner no. 1 was President of the Association with whom the 2-p settlement has been arrived at by the respondent Institute. In view of these facts, the order of suspension dated 30th November, 1987 is required to be quashed and set-aside. Similarly, the order of reducing the subsistence allowance dated 18th March, 1988 is also required to be set-aside on the basis of fact that it cannot be said that the delay in inquiry is attributable to the petitioners. The petitioners have right to approach the Civil Court by way of a Suit and pray for stay of the disciplinary proceedings till the disposal of the criminal case against them. In the present case, the Civil Court has granted the prayer of petitioners which has been confirmed by this Court. It is true that it is the petitioners who have obtained the interim relief from the Court of Law but for that reason, it cannot be said that the delay in completion of disciplinary proceedings against the petitioners is

directly attributable to them. It is on account of the order passed by the City Civil Court that the disciplinary proceedings have been stayed. The petitioners at the most can be said to have indirectly responsible in prolonging the inquiry beyond 90 days but they cannot be said to be directly responsible for it, and therefore, the order passed by the respondent-Institute under Rule 4.4 (a) is not covered. Therefore, the decision taken by the respondent-Institute on 18thMarch, 1988 reducing the subsistence allowance 1/4th of the salary under the provisions of Service Rule 4.4 (a) is totally illegal, arbitrary and hit by Art. 14 of the Constitution of India.

In the result, this petition is allowed. The order of suspension dated 30th November, 1987 and the order reducing the subsistence allowance dated 18th March, 1988 are hereby quashed and set-aside, and as a direct result thereof, the petitioners are entitled to reinstatement in service and also they are entitled to difference of salary and other service benefits as if they were in service during this interim period ie., from 30th November, 1987 till the date of actual reinstatement. It may be clarified that petitioner no. 1 who has already retired from service is only entitled to difference of salary and other service benefits ie., from the date of setting aside of the suspension order dated 30.11.1987 till the date of his retirement. The petitioner no. 3 & 5 are not entitled to any relief as they have settled the dispute finally with the respondent Institute, as admtited by both the parties in the present proceedings. The respondent-Institute is directed to reinstate the petitioners no. 2, 4 and 6 in service within a period of one month from the date of receipt of certified copy of this order and shall arrange to pay them full wages with all service/consequential benefits from the date of suspension dated 30th November, 1987 till the date of actual reinstatement; after deducting the amount of subsistence allowance actually paid to them. The said amount of difference of salary and arrears with all service benefits are required to be paid by the respondent-Institute to the concerned petitioners namely petitioners no. 1,2,4 and 6 within a period of two months from the date of receipt of certified copy of this order. Rule is made absolute. There shall be no order as to costs.

{H.K Rathod, J.}

Prakash*